No. 11-345

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of the respondents.[1]

ADL was organized in 1913 – at a time when anti-Semitism was rampant in the United States – to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. Today, on the eve of its 100th anniversary, it is one of the world's leading civil and human rights organizations, and its history is marked by a commitment to protecting the civil rights of all persons, whether they are members of a minority group or not. ADL believes that each person in our country has the constitutional right to receive equal treatment under the law and that each person has the right to be treated as an individual, rather than as simply part of a racial, ethnic, religious, or gender-defined group. In this connection, ADL has often filed briefs *amicus curiae* in this Court in cases arising under the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

Equal Protection Clause of the Fourteenth Amendment to the Constitution or the Nation's civil rights laws.[2]

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[2] *See*, *e.g.*, ADL briefs *amicus curiae* filed in *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Cardona v. Power*, 384 U.S. 672 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Taxman v. Bd. of Educ.*, 92 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *appeal dismissed per stipulation*, 522 U.S. 1010 (1997); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); and *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

With respect to use of racial preferences in access to social opportunities such as employment and education, ADL has long wrestled with whether such preferences can be reconciled with its core mission – "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens." ANTI-DEFAMATION LEAGUE 1913 CHARTER (1913). And, while ADL has endorsed limited racial preferences in order to remedy specific discrimination, it has consistently opposed the non-remedial use of race-based criteria, except under highly limited circumstances in the educational context where the government can identify a compelling interest to justify them and has narrowly tailored their use to meet those legitimate interests.

In the context presented here, ADL agrees with the University of Texas at Austin that diversity in higher education is a compelling government interest. Through its work in a variety of education-related settings, ADL has grown to understand that diversity in education is critical, not only because of its contribution to the educational experience but also as a factor in the development of a fully integrated society which honors inclusiveness and which is free of racial and ethnic hatred and the discrimination which flows from it. The admissions policy at issue here is narrowly tailored to achieve that compelling government interest and does not operate as an overt or covert quota system. Therefore, ADL believes that on this record UT's use of race as one factor in its holistic review of applicants passes constitutional muster.

SUMMARY OF THE ARGUMENT

1. ADL's experience in a variety of education-related settings indicates that exposure to a diverse academic community serves critical societal needs. However, despite its commitment to diversity, ADL firmly believes that the Constitution prohibits affirmative action programs from imposing quotas, assigning persons to categories based on their race, or using race as a determinative factor in making admissions decisions.

2. This is the first case which has come before the Court in which ADL believes that a university has used the proper means to achieve a diverse student body. The uncontested record makes clear that UT (i) only implemented its current admissions policy because its prior, race-neutral admissions policy had not achieved UT's diversity goals, (ii) takes race into account only as part of a holistic review of applicants in which race is never a determinative factor in making an admissions decision, and (iii) does not use overt or covert quotas. These conceded facts demonstrate that UT's admissions process is narrowly tailored to achieve diversity in the context of higher education (which the Court has recognized constitutes a compelling governmental interest).

3. In light of these facts, the Court need not rely on UT's professions of good faith or defer to UT's legal judgment; the undisputed record shows that UT's admissions process satisfies strict scrutiny.

ARGUMENT

I. ADL'S EXPERIENCE DEMONSTRATES THE IMPORTANCE OF DIVERSITY IN HIGHER EDUCATION

Amicus ADL has long opposed both de jure and de facto segregation in our schools – its history of amicus activity in this Court's school desegregation cases extends back to *Brown*, and its governing body has condemned de facto discrimination in the Nation's schools repeatedly. ADL has fought to eradicate racial, ethnic, and religious bias in our Nation and to promote understanding among its disparate peoples for almost 100 years. As a leading civil rights organization, ADL has vigorously supported enactment and enforcement of the Nation's major anti-discrimination laws. It is a pioneer in the promulgation of hate crime statutes; variations of its model hate crime statute have been adopted as law in 45 states. It is a leader in producing educational materials and programs designed to fight hate, bias, and prejudice; its premier educational initiative, the A WORLD OF DIFFERENCE® Institute (the "Institute"), brings children of all races together to learn the values of respect and diversity, bridging racial, ethnic, and religious differences and striving to reduce the tensions that spring from them. The Institute has reached literally hundreds of thousands of teachers and peer trainers and, through them, millions of students, in an effort both to eradicate bias and hate before it hardens, as well as to promote diversity and pluralism.

ADL's real-world, front-line experience demonstrates that efforts to further diversity bear educational fruit. For example, ADL's experience with its CAMPUS OF DIFFERENCE™ program, which provides college and university students with practical, experiential, hands-on training to foster intergroup understanding and equip students to live and work successfully in a diverse world, has reinforced ADL's belief that diversity enriches the educational experience. ADL has found that a diverse educational environment challenges all students to explore ideas, perspectives and experiences that they might not otherwise explore, to see issues from new points of view, to rethink their own premises and prejudices, and to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with other or differing views. It is not just ADL which has reached this conclusion: there is a growing body of literature demonstrating that "diverse student populations enhance educational outcomes in undergraduate and graduate higher education . . . ." *See* Kathryn A. McDermott, *Diversity or Desegregation? Implications of Arguments for Diversity in K-12 and Higher Education*, 15 EDUC. POLICY, no. 3, 2001 at 452, 456.[3]

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[3] Specifically regarding racial diversity as a component of diversity, "[r]esearch indicates that cross-race interaction has positive impacts on a range of important outcomes and that the greater the structural diversity of an institution, the more likely that students are to engage in these types of interaction." *See* Jeffrey

(Continued...)

In addition to aiding colleges and universities in achieving these educational goals, a diverse campus environment can also create opportunities for people from diverse backgrounds, with different life experiences, to come to know one another outside the classroom as more than passing acquaintances and to develop mutual respect for one another. Informal interactions of this kind "help students develop the skills to participate and lead in a diverse democracy." *See* Patricia Gurin, et al., *Diversity and higher education: Theory and Impact on Educational Outcomes*, 72 HARVARD EDUC. REV. no. 3, 2002 at 330, 353.

ADL's experience with the CAMPUS OF DIFFERENCE™ program underscores what the American Council on Education[4] has recognized: learning in a diverse educational environment promotes personal growth by challenging stereotyped preconceptions, encouraging critical thinking, and helping students to communicate effectively with people of varied backgrounds,

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F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, *in* COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES, Ch. 5-11 (Mitchell Chang, et al. eds., 2003).

[4] American Council on Education, *On the Importance of Diversity in Higher Education,* http://www.acenet.edu/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=45474 (last visited August 2, 2012).

thereby preparing students to become good citizens in an increasingly complex, pluralistic society. As the American Council on Education has noted, America's continued prosperity is dependent upon its ability to make effective use of the talents and abilities of all of its citizens, in work settings that bring together individuals from diverse backgrounds and cultures.[5]

In short, ADL's experience indicates that exposure to a diverse academic community not only reduces prejudice, but it also improves education, better prepares our students for possible graduate education and career opportunities, and enhances the United States' ability to compete in a globalized economy. Embracing diversity and promoting a fully integrated society is crucial not only to the struggle to defeat discrimination, but also to the continued vitality of our Nation and our society.

II. DESPITE THE IMPORTANCE OF DIVERSITY, THE ENDS DO NOT, AND CONSTITUTIONALLY CANNOT, JUSTIFY VIOLATIONS OF CORE EQUAL PROTECTION PRINCIPLES

ADL's staunch commitment to diversity has not diminished its belief in the centrality of the precept that the Equal Protection Clause obligates government to refrain from racial discrimination in all forms. For this reason, despite its commitment

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[5] *See id.*

to diversity, ADL has *opposed* virtually all of the racial classifications that have been challenged in this Court, including racial preferences and quotas in affirmative action programs, arguing that they discriminate on the basis of impermissible characteristics and thus violate this core value of equal protection. *See* ADL amicus filings cited in fn. 2, *supra*. ADL has long maintained that when government uses race as a decisive factor in allocating opportunity or benefits, it ignores merit and improperly classifies citizens on the basis of immutable characteristics that are, or should be, irrelevant in a free and democratic society.

For example, in *DeFunis*, ADL argued that the University of Washington Law School violated the Fourteenth Amendment by instituting a policy "that amounted to the establishment of a quota, no matter what 'cloak of language' was . . . used by the Law School to disguise the fact from itself as well as from others."[6] Similarly, in *Bakke*, ADL took the position that the University of California was not entitled to "utilize race as the determinative factor in the admission and exclusion of candidates for its medical school at Davis."[7] Likewise, in *Grutter*, ADL argued that the University of Michigan's admissions policies

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[6] Brief of Anti-Defamation League of B'nai B'rith as Amicus Curiae at 22, *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

[7] Brief Amici Curiae of Anti-Defamation League of B'nai B'rith, *et al.* at 6, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

"den[ied] to non-minority applicants the individualized consideration that is at the core of equal protection."[8]

ADL's longstanding position has been that affirmative action programs are invalid when they impose quotas, or use race as a determinative factor in making admissions decisions, or act in a manner that assigns persons to categories based on their race. ADL continues to believe that the use of race as a proxy for diversity "runs afoul of the Equal Protection Clause."[9]

Nevertheless, ADL also believes that affirmative action programs can be structured in a manner that will not violate equal protection principles, and that, when implemented properly, such programs can serve compelling government interests. As the former Chairman of ADL's National Law Committee explained (in a law review article he wrote in his personal capacity), "[f]ew would argue against the proposition that a diverse student body including qualified minority group members is educationally enriching for those admitted to law school. The issue is not the desirability of a diverse student body but the means by which it is to be achieved." Larry M. Lavinsky, DeFunis v. Odegaard*: The 'Non-Decision' With a Message*, 75 COLUM. L. REV. 520, 524 n.20

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[8] Brief Amicus Curiae of Anti-Defamation League in Support of Neither Party at 18, *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[9] *Id.* at 15.

(1975). *See also Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) (noting the "dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means").

This is the first case which has come before the Court in which ADL believes that a university has used the proper means to achieve a diverse student body. As discussed in more detail below (*infra* Sec. III.B.), UT takes an applicant's race into account only as part of a holistic review of applicants in which race is never a determinative factor in making an admissions decision. App. at 27a-32a. Moreover, unlike in other cases that have come before this Court, here it is uncontested that UT does not use overt or covert quotas and "does not monitor the aggregate racial composition of the admitted applicant pool during the process." *See id.* at 32a. *Compare id.* and JA 131a (Petitioner's concession as to the lack of quotas) *with Bakke*, 438 U.S. at 289 (where 16 special admissions seats were reserved for minorities, "[w]hether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status") *and Grutter*, 539 U.S. at 391 (Kennedy, J., dissenting) (criticizing admissions officers at Michigan Law School for consulting "daily reports which indicated the composition of the incoming class along racial lines" during the period when admissions decisions were being made). Because the conceded record makes clear that UT has implemented an admissions process that satisfies strict scrutiny, increasing diversity while adhering to core equal protection principles,

ADL, for the first time, submits a brief in support of a university's affirmative action plan.

III. UT'S USE OF RACE AS ONE FACTOR IN A HOLISTIC ADMISSIONS PROCESS SATISFIES STRICT SCRUTINY BECAUSE IT IS NARROWLY TAILORED TO ACHIEVE THE COMPELLING GOVERNMENT INTEREST IN DIVERSITY

"It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved*, 551 U.S. at 720. "This standard of review is not dependent on the race of those burdened or benefited by a particular classification." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (citations omitted). *See also Grutter*, 539 at 379 (Rehnquist, J., dissenting) ("the same strict scrutiny analysis" applies "regardless of the government's purported reason for using race and regardless of the setting in which race [i]s being used").

As the Court has explained, "requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications . . . detailed examination, both as to ends and as to means." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995). Because "*all* racial classifications . . . must be analyzed by a reviewing court under strict scrutiny," even "so-called 'benign' racial classifications, such as race-conscious university admissions policies," must use narrowly tailored

means to further ends that amount to compelling governmental interests. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (citations omitted).

Nevertheless, strict scrutiny is not "'strict in theory, but fatal in fact.'" *Adarand*, 515 U.S. at 237 (citation omitted). "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. . . . When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Grutter*, 539 U.S. at 326-27.

A. Diversity is a Compelling Government Interest

This Court has properly recognized that diversity in the context of higher education is a compelling state interest. *See Parents Involved*, 551 U.S. at 722 ("The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*. . . . The diversity interest was not focused on race alone but encompassed 'all factors that may contribute to student body diversity.'") (citing *Grutter*, 539 U.S. at 328, 337) (internal citations omitted); *see also Grutter*, 539 U.S. at 392-93, 395 (Kennedy, J., dissenting) (explaining that "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity" and approving the use of admissions policies that "giv[e] appropriate consideration to race" in the "special context" of

university admissions, while objecting to the particular policies adopted by Michigan Law School).

As explained above (*supra* Sec. I), ADL agrees that a diverse campus environment enriches the educational experience, increases civic engagement, and better prepares students to succeed in their professional lives. *See also Grutter*, 539 U.S. at 330 (explaining the "educational benefits that flow from student body diversity" and citing studies showing that student body diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals") (citations omitted).

B. The Means Used by UT to Achieve Diversity Are Narrowly Tailored

Narrow tailoring requires that "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986). In the context of higher education, universities must engage in "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks" but they need not exhaust "every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339.

When a race-neutral alternative is not viable, universities must ensure that their race-conscious admissions policies "not unduly harm members of any racial group," a standard which can be

achieved by implementing a policy that considers "all pertinent elements of diversity" so that the university "can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants." *Id.* at 341. The university must also "consider[] each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education." *Gratz*, 539 U.S. at 271.

Here, UT has not only *considered* using race-neutral alternatives to achieve diversity, it has actually *used* just such a system between 1997 and 2004. App. at 120a-124a. Indeed, UT only implemented its current admissions policy after it had conducted a study, and engaged in extensive deliberations, to determine whether its race-neutral admissions policy was achieving UT's diversity goals. App. at 125a-126a. *See also* JA 396a ("After several months of study and deliberation, including retreats, interviews, review of data of diversity in the classroom, and other factors, UT Austin decided to authorize the consideration of race in its undergraduate admissions policy."). The admissions policy at issue here was established because UT reached the reasoned conclusion that its prior race-neutral admissions policy had proven insufficient to achieve those goals. *Id.* 125a-126a. *See also* JA 396a (UT's study demonstrated that "the educational benefits of a diverse student body were not being provided to all the University's

undergraduate students" during the period when a race-neutral admissions policy was in effect).[10]

Moreover, the record indicates that the race-conscious admissions policy implemented by UT in 2005 considers "'all pertinent elements of diversity'" and does not "'unduly harm members of any racial group.'" *See Grutter*, 539 U.S. at 341 (citations omitted). As Petitioner concedes, when race is considered at all,[11] UT considers it in such a manner that "may be beneficial to minorities *or non-minorities*." JA 130a (emphasis added). Moreover, it is undisputed that race – again, to the extent it is considered at all – is considered alongside other intangible "special circumstances" such as socioeconomic status, family status, whether languages other than English are spoken at home, and family responsibilities, each of which contributes to creating a diverse student body. App. at 28a. Indeed, those special circumstances are just one part of a student's "personal achievement score," which takes into account an applicant's "leadership qualities, awards and

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[10] UT has committed to re-evaluating the admissions process every five years, specifically to assess whether consideration of race is necessary to the admission and enrollment of a diverse student body or whether race-neutral alternatives exist that would achieve the same results. App. at 167a-168a.

[11] As Petitioner concedes, race is never taken into account in admitting those applicants admitted to UT pursuant to the Top 10 Percent Law. JA 118a-119a, 128a, 139a-141a.

honors, work experience, and involvement in extracurricular activities and community service," none of which is "considered individually or given separate numerical values to be added together." *Id.* at 28a-29a. And even the personal achievement score is only one of the elements in an applicant's Personal Achievement Index, which also takes into account the applicant's score on two required essays. *Id.* at 26a-27a. As such, race can, at most, "influence only a small part of the applicant's overall admissions score," as part of a holistic review that is quality-controlled to ensure that it is being faithfully applied. *Id.* at 28a-29a.

In this case, it is noteworthy that none of those facts is in dispute. Indeed, Petitioner has affirmatively conceded that UT engages in a holistic review of applicants, and there is no evidence that suggests that race overrides any other factors under consideration. As Petitioner conceded in its statement of facts submitted to the district court, "[t]he consideration of race helps UT Austin examine the student in 'their totality,' 'everything that they represent, everything that they've done, everything that they can possibly bring to the table.'" JA 129a. Indeed, Petitioner acknowledges not only that UT's admissions policy mandates a holistic review, but also that it has been implemented in a manner that ensured that "UT Austin has not established a goal, target, or other quantitative objective for the admission and/or enrollment of under-represented minority students for any of the incoming classes admitted in 2003 through 2008." JA 131a. *See also id.* (conceding that "UT Austin has not tracked or

measured the impact of race as a factor in its admissions decisions").

C. The Court Need Not, and Should Not, Defer to UT Regarding Any Issue Other Than Its Educational Judgment

As the district court properly recognized (and Petitioner concedes, Pet. Br. at 50), deference is due to a university's "educational judgment that . . . diversity is essential to its educational mission" (App. at 148a, 166a (citing *Grutter*, 539 U.S. at 328)); a university's legal judgment regarding whether strict scrutiny has been satisfied, in contrast, deserves no such deference. *See Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) (distinguishing "deference to a university's definition of its educational objective" from "deference to the implementation of this goal"). Here, however, as the district court explained, "the undisputed record and evidence establishes that UT has given serious, good faith consideration to workable race-neutral alternatives" and the undisputed record likewise establishes that UT considers race "as a factor of a factor of a factor of a factor" in its admissions process. App. at 159a, 166a.[12]

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[12] In light of these undisputed facts, the Court need not reach the issue raised by Petitioner (and certain amici on its behalf) concerning the Fifth Circuit's purported "comprehensive deference to UT under a novel 'good faith' standard." Pet. Br. at 47-52.

ADL agrees that the Court should not "be satisfied by [UT]'s profession of its own good faith" or "take [UT] at its word" that the admissions policy it has implemented is narrowly-tailored. *See Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). In this case, however, the Court need not rely on UT's professions of good faith because Petitioner concedes that UT considered race-neutral alternatives and engaged in a holistic, non-quota-based review of applicants in which race was only one of the many factors considered. Because the undisputed facts satisfy the narrowly-tailored, strict scrutiny standard, summary judgment was properly granted to Respondents.

* * *

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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